SUPREME COURT, U. S.
AUG 10 1970

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 513

SUSAN BEAUMONT,
PETITIONER,

v.

CHRISTIAN W. AUSSENHEIMER, ET AL,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	Page
Citations To Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement Of The Case	3
Reasons For Granting The Writ	11
Conclusion	19
Appendix A — Opinions Below	20
District Court	20
Circuit Court	25
Appendix B — Statutes Involved	35
Appendix C — Petitioner's letter	42

TABLE OF CITATIONS

Cases.

Bauers v. *Heisel*, 361 F.2d 581 (3d Cir. 1966) 11

Bayamon Thom McAn, Inc. v. *Miranda*, 409 F.2d 968 (1st Cir. 1969) 14

Belger v. *Arnot*, 344 Mass. 679 (1962) 17

Breen v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969) 11

Caplan v. *Johnson*, 414 F.2d 615 (5th Cir. 1969) 11

Coca Cola Bottling Co. of Black Hills v. *Hubbard*, 203 F.2d 859 (8th Cir. 1953) 12

Collum v. *Butler*, 421 F.2d 1257 (7th Cir. 1970) 11

Dacey v. *New York County Lawyers' Assoc.*, 423 F.2d 188 (2d Cir. 1969) 11

Eisenberg v. *Smith*, 263 F.2d 827 (3d Cir. 1959), *cert. denied*, 360 U.S. 918 (1959) 13, 15

El Rancho, Inc. v. *The First National Bank of Nevada*,

Page

406 F.2d 1205 (9th Cir. 1968), *cert. denied*, 396 U.S. 875 (1969) 13

Fountain v. *Filson*, 336 U.S. 681 (1949) 14

Glazer v. *Glazer*, 374 F.2d 390 (5th Cir. 1967), *cert. denied*, 389 U.S. 831 (1967) 15

Green v. *The American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), *cert. denied, sub nom. The American Tobacco Co.* v. *Green*, 377 U.S. 943 (1964) 12

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 11

Hiebert Contracting Co. v. *Trager*, 274 F.Supp. 801 (Mass. 1967) 15

Johnson v. *Mueller*, 415 F.2d 354 (4th Cir. 1969) 11

Johnson v. *New York, N.H. & Hartford R. Co.*, 344 U.S. 48 (1952) 14, 15

Jones Truck Lines v. *Argo*, 237 F.2d 649 (8th Cir. 1956) 15, 16

Joseph v. *Rowlen*, 402 F.2d 367 (7th Cir. 1968) 11

Karjalainen v. *Buswell*, 289 Mass. 419 (1935) 16

Lewis v. *Hears*, 189 F.Supp. 503 (Pa. 1960), *aff'd* 297 F.2d 101 (3d Cir. 1961), *cert. denied*, 369 U.S. 873 1962) 16

Lynch v. *Johnson*, 420 F.2d 818 (6th Cir. 1970) 11

Monroe v. *Pape*, 365 U.S. 167 (1961) 11

Montgomery Ward & Co. v. *Duncan*, 311 U.S. 243 (1940) 14

Neely v. *Eby Construction Co.*, 386 U.S. 321 (1967) 14

O'Malley v. *Cover*, 221 F.2d 156 (8th Cir. 1955) 15

Pierson v. *Ray*, 386 U.S. 547 (1967) 11

Slocum v. *New York Life Insurance Company*, 228 U.S. 364 (1913) 14

Stringer v. *Dilger*, 313 F.2d 536 (10th Cir. 1963) 11

Tenney v. *Brandhove*, 341 U.S. 367 (1951) 11

United States v. *Fenix and Scisson, Inc.*, 360 F.2d 260 (10th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967) 15

Page

Weade v. *Dichman, Wright & Pugh, Inc.*, 337 U.S. 801 (1949) 14

Whirl v. *Kern*, 407 F.2d 781 (5th Cir. 1969), *cert. denied*, 90 S.Ct. 210 (1969) 11, 12

Constitutional Provisions

Seventh Amendment to the Constitution of the United States of America 14

Statutes and Rules

Federal Rules of Civil Procedure, Rule 50 13, 15
Massachusetts G.L. (Ter. Ed.) c. 123, §51 7
Massachusetts G.L. (Ter. Ed.) c. 123, §77 7, 8, 10
Massachusetts G.L. (Ter. Ed.) c. 123, §79 5
28 U.S.C. §1254 2
42 U.S.C. §1983 11

Texts

5 MOORE'S FEDERAL PRACTICE §§50.04, 50.08 15, 16
RESTATEMENT (SECOND) OF TORTS, §§35, 120(c) 12

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SUSAN BEAUMONT,
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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause on June 8, 1970.

CITATIONS TO OPINIONS BELOW

The opinion in the United States District Court for the District of Massachusetts is unreported, and the opinion of the United States Court of Appeals for the First Circuit has not as yet been reported, but both are printed in Appendix A hereto, *infra*, ps. 20-34.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on June 8, 1970, and the court ordered a stay of its mandate until August 12, 1970, to permit the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Does a plaintiff in a Federal Civil Rights Act case have the burden of proving that the defendants had no justification in causing her imprisonment?

2. When a federal case is submitted to the jury on a legal theory to which defendants took no objection, can they later object when a verdict is returned for the plaintiff, or has that legal theory become the law of the case?

3. Can a court of appeals affirm a judgment for the defendants notwithstanding the verdict on the ground of insufficient evidence when defendants' motions for directed verdicts were neither sufficiently specific nor renewed at the close of all the evidence, and the defendants did not object to the jury instruction that the evidentiary burden was theirs—an instruction correctly reflecting every federal decision until this one—or can it only order a new trial?

4. Even if the plaintiff in this Civil Rights Act case had the burden of proving the defendants had no justification for causing her imprisonment, did the evidence permit the court of appeals to substitute itself for the jury and rule there was no such evidence?[1]

[1] The trial court granted judgments n.o.v. for respondents on different grounds than those devised by the circuit court, (see pp. 20-24, *infra*) and they constituted questions briefed and argued below,

STATUTES INVOLVED

The statutory provisions involved are 42 U.S.C. § 1983, Massachusetts General Laws, c. 123, §§ 51, 77, 79, and Rule 50 of the Federal Rules of Civil Procedure. All such provisions are set out verbatim in Appendix B hereto, *infra*, ps. 35-41, in accordance with Rule 23(1) (d).

STATEMENT OF THE CASE

As the court below affirmed judgments for the respondents notwithstanding a jury verdict for the petitioner, only the evidence most favorable to the petitioner can be considered. So viewed, the jury could have found the following facts:

July 3, 1967, was a very hot day in Cambridge, Massachusetts, and at about 2:00 p.m. the petitioner, a woman then 46 years old, took her dog for a walk, stopped in at a neighborhood cocktail lounge, and had three Manhattans. (Tr. 1-17, 1-21) [2] The last thing she remembered, before waking to find herself strapped to a table in a white room, was walking outside the tavern, where, she thought, from a combination of the heat, three Manhattans, and the fact she was going through her menopause, she fainted.

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but the court considered it unnecessary to reach them. They do not constitute grounds for the issuance of the writ, but if it is granted respondents may forward two of them as alternate reasons to affirm the judgments: 1. that respondents, Paine and Aussenheimer, had absolute liability, and 2. that all respondents had a qualified immunity because they acted in good faith. Petitioner respectfully reserves the right to reply to the merits in such an instance.

[2] The consolidated record appendix has been certified by the Clerk of the United States Court of Appeals for the First Circuit, and it consists of three volumes: Volume I containing the pleadings (cited herein as R.), Volume II containing the transcript, which is paginated by trial days: 1-17, 2-11, 3-5, etc. (cited herein as Tr. 1-17, for instance), and a volume entitled Exhibits (cited herein as Ex. pp. 4-5, for instance).

(Tr. 1-23, 1-56; Ex. p. 110') She was "very frightened" when she came to, and became more so when no one would tell her what had happened or where she was. (Tr. 1-23, 1-25) In fact, the petitioner was in Cambridge City Hospital, where an intern who had begun his internship only three or four days before then executed an application for her admission to Westborough State Hospital, a Massachusetts state mental hospital (Tr. 3-43), having "dismissed" the idea of admitting her and "letting her sleep it off." (Tr. 2-4, 2-5, 2-11, 2-12; Ex. pp. 4-5) In the application the intern made only the notation:

> "Pt. found by police, crying and muttering about self-destruction. Resisted violently being brought to hospital, claiming police and hospital personnel were trying to kill her. Is oriented but says she wants to die and will die today. Smells strongly of alcohol . . . ."

The petitioner was then rolled onto a stretcher, still strapped down, and put in a motor vehicle (which turned out to be an ambulance), the other occupants of which also refused to answer her questions or tell her where she was being taken. (Tr. 1-23 to 1-26) She struggled to get free, and, still unaware who these people were or what was happening to her, she became hysterical. (Tr. 1-25 to 1-26; Ex. 11B) She became aware that the vehicle had left the city and gone out into the countryside, which frightened her even more. (Tr. 1-26) Eventually she was unloaded, and, still strapped to the stretcher by bonds which pained her, wheeled into a building which she was not told was a hospital, and seen by the respondent Grimberg, whom she did not know was a doctor. (Tr. 1-26) Grimberg came to this country in 1960, after education in Cuba and Spain, and after receiving a bachelor of sci-

ence degree from Sienna University in Baton Rouge, Louisiana, and working two years as a research associate at the University of Miami School of Medicine, had come to Westborough as a senior psychiatrist the year before, 1966. (Tr. 2-26) He had been first authorized to admit patients seven months before July 3, 1967. (Tr. 2-27) Grimberg asked the petitioner her name, age, some "routine questions"; she answered some of them, but, as he seemed hostile, almost looked disgusted, she thought it would not help to cooperate with him, and refused to answer other questions, whereupon he just said, "Take her away." (Tr. 1-27) He took no medical history, asked nothing about how the incident had happened, or whether she had ever been hospitalized before. (Tr. 1-27) In fact, she had not been in a mental hospital before or since and had not been treated by a psychiatrist before or since. (Tr. 1-58)

Although Massachusetts law requires that the superintendent of the hospital make a determination whether a person is "in need of immediate care and treatment because of mental derangement other than drunkenness," Massachusetts G.L. (Ter. Ed.) c. 123, § 79, Grimberg admitted that he had testified in a deposition that he admitted the petitioner simply on the basis of the intern's application, although at trial he said he also "relied on something else." (Tr. 2-31 to 2-35.[3] Although superintendent of Westborough for more than sixteen years, the respondent Sharp did not even know that the law required him (or, inferrably, his staff) to make an independent determination whether to commit a person upon receiving a § 79 application. (Tr. 3-43, 3-59)

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[3] Grimberg also knew, as he admitted in a deposition, that a § 79 application had to be signed by a "fully licensed physician" and that he could not "sign a Section 79," having only an intern's registration. (Ex. p. 67) This exhibit was excluded by the trial court, however, and only marked for identification. (Ex. p. 60)

As the petitioner was belligerent, hostile, and "drunk," Grimberg prescribed a tranquillizer be injected "to insure she would have a good night's sleep." (Tr. 2-62a) His diagnosis in her admission record was "classical alcoholic intoxication." (Ex. p. 9) She was taken upstairs, roughly stripped naked by a male attendant, given a short hospital nightgown, and thrown in a locked and barred room furnished only with a mattress. (Tr. 1-28 to 1-29; Ex. p. 19) She was "panic stricken"; her requests for water went unheeded until about 11:00 p.m. when a nurse got her some water and for the first time told her she was in a mental hospital. (Tr. 1-28 to 1-29)

The next day, July 4, 1967, the petitioner was forcibly injected with a tranquillizer, locked into the violent ward, although "cooperative," told she could not make a telephone call without permission of a doctor, and that no doctor was available. (Tr. 1-30 to 1-32, 1-84; Ex. p. 19) The next day she talked to the respondent Segal, her "ward physician," for a few minutes, told him she had had three drinks and fainted and ended up at Westborough. (Tr. 1-33 to 1-34; Ex. p. 59) Segal took no history, but said he didn't understand why she was there; that if "they" thought she was drinking "they" should have taken her to jail (the petitioner agreed); and that he would try and find out what happened. (Tr. 1-34) That same afternoon, July 5, 1967, the petitioner, dressed in a cotton "State dress" "three sizes too big," her slip hanging out beneath, "pretty messy" looking, was brought into a large room with a great many people around a table. (Tr. 1-34, 1-37) This turned out to be a staff meeting; Doctors Grimberg and Segal were there, and respondent Simon, the Director of Psychiatry, conducted the meeting. (Tr. 1-34 to 1-35; 3-4) The petitioner told of fainting; Simon, referring to some papers, said she was drunk; she denied that; Simon said she had threatened to kill herself;

she said "there has been a mistake made, the report is garbled"; Simon said "someone was sick and [petitioner] knew who it was." (Tr. 1-35) Petitioner told Simon the name of her physician[4] who had treated her for an infection, and Simon's only insulting inquiry was whether it was gonorrhea. (Tr. 1-36) It was not. (Tr. 1-36) Otherwise noting that he thought petitioner's speech "affected," Simon ended the ten minute interview by saying: "We will let you know." (Tr. 1-37 to 1-38). She was returned to "the violent ward." (Tr. 1-38) Simon determined, however, and noted in her record, that it was "imperative that she have a significant period of observation," alluding to her "artistic pretentions,"[5] "affected speech," "threats of suicide," and "absence of any insight in this situation," and recommended a 40 day committal under Massachusetts G.L. (Ter. Ed.) c. 123, § 77. (Tr. 3-5; Ex. p. 11A)

For a court to order a § 77 commitment there must be a certificate from two doctors selected by the superintendent, but not on the hospital staff, that the commitment is necessary because the person "would be dangerous if at large." Massachusetts G.L. (Ter. Ed.) c. 123, § 51.[6] Accordingly, on July 6, 1967, the respondents, Paine and Aussenheimer, talked to the petitioner for about ten minutes. (Tr. 1-86, 3-26 to 3-27, 3-34; Ex. pp. 47-48) Doctor Paine, an 83 year old "psychiatrist," with some "difficulty hearing," had, every Tuesday for 18 years, gone to the hospital to "certify" the patients brought to his attention that week by a "secretary," bringing a supply of partially

[4] The petitioner in a letter (Ex. p. 58) also referred superintendent Sharp to her personal physician by name and address and asked that he be consulted. The record is silent as to whether any respondent ever endeavored to do so.

[5] The petitioner *was* an artist (Tr. 1-19 to 1-20), but, so far as appears, Simon never saw any of her work.

[6] Two alternative grounds are provided for in the statute, but were not applicable to the petitioner and were not the basis of the commitment order. (Ex. p. 49)

completed certification forms with him. (Tr. 3-24, 3-33 to 3-34, 3-39) The county paid him a fee for each certification examination. (Tr. 3-37) Other than the interview with the petitioner, the only information relied on in certifying her as committable was the original § 79 application for admission form. (Tr. 3-26) When Paine interviewed the petitioner, he recalled that "she was not particularly cooperative," and made "very positive statements that she was not insane, not drunk." (Tr. 3-34) The reason Paine felt the petitioner should be committed was her statement that she had "blacked out" "after drinking three Manhattans" and "the suicidal talk" mentioned in the § 79 application. (Tr. 3-36) While admitting that those facts would not require commitment in a mental hospital in every case, Paine could only say, when asked what required it in the petitioner's case: "She gave me that impression." (Tr. 3-36) He never said, either in the certificate or his testimony, that the petitioner would be "dangerous if at large," and no such opinion appears anywhere in her hospital record.

Aussenheimer, the other certifying doctor, could not even recall talking to the petitioner. (Tr. 3-27) He was a general practitioner who for 12 years went to Westborough the third Tuesday of every month and certified the patients on the list provided by the secretary, each time with Doctor Paine. (Tr. 3-23 to 3-24)

Relying solely on Paine and Aussenheimer's certification, with no hearing and no notice to the petitioner,[7] the next day, July 7, 1967, the judge of the local district court ordered the petitioner's commitment at Westborough for 40 days. (Ex. p. 49) While the order was not served on the hospital until July 8, 1967 (Ex. p. 50), an entry had been previously made in the petitioner's hospital record the day before that she was committed under § 77. (Ex.

[7] Arguably, both are required under Massachusetts law.

p. 11B) Other than to observe that entry in petitioner's hospital record "is routine, automatic," respondent Sharp did not have "the slightest idea" how this prescience occurred. (Tr. 3-52 to 3-53)

On July 7, 1967, Doctor Segal saw the petitioner for the second time, for a few minutes, told her she was being held because she "was supposed to have been drunk," and transferred her out of "the violent ward." (Tr. 1-42) On July 10, 1967, Segal made his first "Progress Note" entry in petitioner's record: that she was "non-cooperative, arrogant and saucy, demanding her rights, and complaining that she is not getting attention and care."[8] (Ex. p. 11A)

On July 11, 1967, the petitioner wrote a letter to Superintendent Sharp explaining the injustice of her situation, and asking that he investigate it.[9] (Ex. pp. 56-58) Sharp said he only referred the letter to Segal, and so notified the petitioner on July 14, 1967, (Ex. p. 59), but Segal denied ever seeing the letter. (Tr. 2-97)

Segal briefly saw the petitioner for the third and last time about July 14, 1967,[10] when he told her he was requesting her release, and that if it were up to him, he would have released her right then, but he was bound up in "red tape." (Tr. 1-43 to 1-44; Ex. p. 24) He testified that the only reason he had not released her sooner was because she was not "cooperative," but his efforts both to justify cooperation as the determinative and to support its prior absence undoubtedly rendered his entire testi-

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[8] Petitioner had sustained several physical injuries upon her admission on July 3, 1967, which were ignored or only casually and belatedly attended to. (Tr. 1-32; Ex. pp. 6, 19, 22, 56-57)

[9] This lucid and human document is recommended to the Court. It was one of the most important pieces of evidence, and was read to the jury just before petitioner rested. (Tr. 3-66) It is made a part of this petition as Appendix C, pp. 42-43, *infra*.

[10] Segal testified that he saw the petitioner "every day," but the nurse's notes (Ex. pp. 19-24) corroborated petitioner's testimony that he only saw her three times.

mony uncredible to the jury. (Tr. 2-72 to 2-86) The nurse's notes also have as their recurring theme that the petitioner was "quiet and cooperative," at least after the first night. (Ex. pp. 19-27) Segal noted in petitioner's medical record on July 14, 1967, that she was "ready for discharge." (Tr. 2-82; Ex. p. 11B)

Other than the few short conversations stated above, the petitioner was seen by no doctor during the entire time she was in the hospital. (Tr. 1-44) She was tranquillized four times a day until she broke out in a rash. (Tr. 1-45, 1-87; Ex. pp. 15-18)

Towards the end of her incarceration petitioner wrote to the Harvard University Law School Legal Aide Society. (Tr. 1-46) On or about July 17, 1967, a woman from that office came to visit the petitioner, who subsequently spoke to her on the telephone. (Tr. 1-48 to 1-49) The woman also spoke with Superintendent Sharp on July 17, 1967, who then made an entry in petitioner's record on that date that because of the attorney's inquiry and Doctor Segal's "note" of three days before that the petitioner should be discharged, that an "early review appears to be in order." (Ex. p. 11B)

On July 19, 1967, the petitioner was interviewed by Simon at a staff conference for a few minutes (inquiry was made about her physical injuries, that her dog was in a kennel, and that she intended to go back to work.) (Tr. 1-50 to 1-51) When she left the conference, the petitioner had another telephone conversation with the woman from Harvard Legal Aid, and shortly thereafter that day, petitioner was released. (Tr. 1-51 to 1-52)

After a § 77 commitment the superintendent has the duty to release the person before the forty days are up if "no longer in need of treatment." On July 24, 1967, the hospital reported petitioner's release to the court, observ-

ing: "... Observation and examination revealed this woman to be without evidence of psychosis ..." (Tr. 3-57; Ex. p. 11B)

REASONS FOR GRANTING THE WRIT

In ruling here, contrary to common law tort principles, that the "... plaintiff, not the defendants, has the burden on the issue of justification," the First Circuit placed itself squarely in conflict with every other court of appeals which has addressed itself to this fundamental interpretation of the Civil Rights Act, 42 U.S.C. § 1983. *Whirl* v. *Kern*, 407 F. 2d 781 (5th Cir. 1969), *cert. denied*, 90 S. Ct. 210 (1969); *Joseph* v. *Rowley*, 402 F. 2d 367 (7th Cir. 1968); *accord*, *Dacey* v. *New York County Lawyers' Assoc.*, 423 F. 2d 188 (2d Cir. 1969); *Bauers* v. *Heisel*, 361 F. 2d 581 (3d Cir. 1966); *Lynch* v. *Johnson*, 420 F. 2d 818 (6th Cir. 1970); *Colum* v. *Butler*, 421 F. 2d 1257 (7th Cir. 1970); *Breen* v. *Kahl*, 419 F. 2d 1034 (7th Cir. 1969); *Stringer* v. *Dilger*, 313 F. 2d 536 (10th Cir. 1963); *see*, *Johnson* v. *Mueller*, 415 F. 2d 354 (4th Cir. 1969); *Caplan* v. *Johnson*, 414 F. 2d 615 (5th Cir. 1969).

The First Circuit's ruling is also in conflict with the very plain, very fundamental edict of this Court that § 1983 embodies the usual common law concepts pertaining to any claim under the section, that any claim "should be read against the background of tort liability" pertaining to it. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). In another context, the Court has also held that to curtail any fundamental right the state has a "substantial burden of justification." *Griswold* v. *Connecticut*, 381 U.S. 479, 505 (1965). While none of those cases was concerned with false imprisonment, the analogous tort here, the general principle was clearly enunciated. It was not followed here

by the court below, for according to common law tort principles, the *defendant* in a false imprisonment case has the burden of proving any justification, the plaintiff does not have the burden of proving its absence. *Whirl v. Kern*, 407 F. 2d 781 (5th Cir. 1969); RESTATEMENT (SECOND) OF TORTS, §§ 35, 120 (c). In holding to the contrary, with no citation of authority, the lower court here even specifically recognized that its ruling was contrary to the common law rule. Page 30, *infra*, n. 2.

The First Circuit's delineation of what someone illegally imprisoned must prove to recover under the Civil Rights Act directly conflicts with all precedent. The issue is obviously of importance to other litigants, and is starkly presented on the instant facts. If this decision is permitted to stand, it will work injustice for years. For these reasons alone the writ should issue.

But the circuit court's decision highlights another unresolved conflict between circuit courts. Without objection by the respondents, the trial judge correctly and repeatedly instructed the jury that they had the burden of proving petitioner's commitment was legally justified. (Tr. 4-13 to 4-14; 4-18; 3.30 to 4-43; 4-45) Without alluding to the issue (although it was briefed and argued by the petitioner), the First Circuit by its ruling aligned itself with the Eighth Circuit in holding that when a case is submitted to the jury on a legal theory to which there is no objection, that theory does not become "the law of the case." *Accord, Coca Cola Bottling Co. of Black Hills v. Hubbard*, 203 F. 2d 859 (8th Cir. 1963). That holding is in direct conflict, however, with the Fifth and Ninth Circuits. *Green v. The American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), *cert. denied, sub nom. The American Tobacco Company v. Green*, 377 U.S. 943 (1964); *El Rancho, Inc. v. The First National Bank of Nevada*, 406 F. 2d 1205 (9th Cir. 1968), *cert. denied*, 396 U.S. 875 (1969). While the Court did not take advantage

of the recent opportunities provided by the last two cases cited to resolve this conflict, the issuance of the writ here would, peripherally, present a vehicle to do so.

The First Circuit opinion here is in direct conflict with decisions of this Court, and therefore erroneous, for a third reason. Contrary to Rule 50(a) of the Federal Rules of Civil Procedure, no grounds were stated in the motions for directed verdict filed by respondents Greenberg, Segal, and Sharp. (R. 48-50) Respondents Simon, Paine, and Aussenheimer moved that verdicts be directed for them "upon the pleadings, upon the law, and upon all the evidence." (R. 51-53) Very similar wording was held not specific enough to comply with Rule 50(a) in *Eisenhart v. Smith*, 263 F. 2d 827 (3d Cir. 1959), *cert. denied*, 360 U.S. 918 (1959). All respondents also failed to renew their motions for directed verdicts at the close of all the evidence, thereby foreclosing judgments notwithstanding the verdicts (see argument at pp. 15-16, *infra*), but when these matters are conjoined with the fact, as noted above, that respondents also failed to object to the trial judge's charge that *they* had the burden of proving justification, it was error for the circuit court here not to at least order a new trial. The First Circuit opinion injected into the case a rule of law it invented—contrary to every other circuit: that the plaintiff in a Civil Rights Act false imprisonment case must prove the absence of justification. It is simply unfair for this petitioner not to be afforded an opportunity to comply with this newly formulated rule, even if it were deemed to be correct. This Court has consistently ruled that it is wrong to foreclose such an opportunity:

> "The opinions in the above cases make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply

with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved." *Neely* v. *Eby Construction Co.*, 386 U.S. 321, 325 (1967).

"... For here the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court .... [If the order were let stand] the party who had won in the trial court would be deprived of an opportunity to remedy the defect which the appellate court discovered in his case." *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949).

See also, Johnson v. *New York, N.H. & Hartford R. Co.*, 344 U.S. 48 (1952); *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949). The petitioner must at least be given an opportunity to meet this newly devised rule, particularly when it pertains to insufficiency of evidence. To rule otherwise raises fundamental constitutional questions under the Seventh Amendment, *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940), notwithstanding. *See, Slocum* v. *New York Life Insurance Company*, 228 U.S. 364 (1913).

In refusing a new trial and affirming the judgments n.o.v. the First Circuit also raised thereby several subsidiary issues meriting this Court's attention. It excused the respondent's failure to renew their motions for directed verdicts at the close of all the evidence because the trial judge reserved decision on them and because the subsequent evidence "bore only tangentially" on these respondents, citing its opinion in *Bayamon Thom McAn, Inc.* v. *Miranda*, 409 F. 2d 968 (1st Cir. 1969).[11] Such a rule is

[11] Doctor Morgan, the intern who initially applied for petitioner's commitment, was a co-defendant at trial, and he introduced the testimony of the three police officers who took the plaintiff to Cam-

contrary to this Court's consistently strict construction of Rule 50(b), as exemplified by *Johnson v. New York, N.H. & Hartford R. Co.*, 344 U.S. 48 (1952), and contrary to other federal courts. *O'Malley v. Cover*, 221 F. 2d 156 (8th Cir. 1955); *Hibert Contracting Co. v. Trager*, 274 F. Supp. 801 (Mass. 1967).

As noted above, the respondents' motions for directed verdicts did not "state the specific grounds therefor," as is required by Rule 50(a). The First Circuit did not specifically allude to this issue (although it was briefed and argued in both the District Court and the Court of Appeals), however, its decision is necessarily in conflict with other circuit courts. *United States v. Fenix and Scisson, Inc.*, 360 F. 2d 260 (10th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967); *Eisenberg v. Smith*, 263 F. 2d 827 (3d Cir. 1959), *cert. denied*, 360 U.S. 918 (1959); *Jones Truck Lines v. Argo*, 237 F. 2d 649 (8th Cir. 1956); 5 MOORE'S FEDERAL PRACTICE § 50.04. The court below also ignored the corollary, Rule 50(b), that a judgment n.o.v. may be entered for a party only "... in accordance with his motion for a directed verdict ...," thereby conflicting again with other circuit courts. *Glazer v. Glazer*, 374 F. 2d 390 (5th Cir. 1967), *cert. denied*, 389 U.S. 831 (1967); *United States v. Fenix and Scisson, Inc.*, 360 F. 2d 260 (10th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1966); *Lewis*

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bridge City Hospital. The jury returned a verdict for Morgan which was affirmed below, and that case is not encompassed within this petition. The respondents here, however, have consistently claimed any advantages provided by that testimony. See, First Circuit Brief For Defendants, Appellees, Christian W. Aussenheimer, et al, pp. 2-3.

It should, perhaps, be noted in passing, that the circuit court (p. 33, *infra*, n. 3) interpreted the verdict for Morgan to mean that "plaintiff's mental condition on July 3 satisfied § 79," because the jury was instructed that they should find for the defendants if petitioner was in fact committable. But it is just as likely that the jury found only that Morgan was the only doctor who, right or wrong, at least acted responsibly rather than perfunctorily, complied in a real sense with the statutory requirements. The evidence warranted such a dichotomy.

v. *Mears*, 189 F. Supp. 503 (Pa. 1960), *aff'd*. 297 F. 2d 101 (3d Cir. 1961), *cert. denied*, 369 U.S. 873 (1962); *Jones Truck Lines* v. *Argo*, 237 F. 2d 649 (8th Cir. 1956); 5 MOORE'S FEDERAL PRACTICE § 50.08.

Lastly, if as every other federal court has held, the lower court had recognized that the burden of proving justification was, properly, the respondents', the petitioner adduced sufficient evidence (as demonstrated above in the Statement of the Case) for the jury to find, as they did, that since the respondents acted perfunctorily, failed to make reasonable independent determinations—did little more than shufile papers—they did not in any real sense perform their statutory duties, *right or wrong*, and the petitioner, therefore, was illegally denied her freedom. The judgments n.o.v., therefore, could not have been affirmed. The court below also ruled alternatively, contrary to the trial court and jury, that there was no evidence that the respondents had acted as nothing more than "rubber stamps." The evidence does not permit such a ruling. If it was in fact a *finding*—that the respondents did as well as could be expected—then the circuit court improperly constituted itself a jury of three and substituted its opinion for that of the jury of twelve, without having the advantage of observing the witnesses.

The only authority cited below for holding that because the petitioner offered no expert medical testimony that the respondents erred, there was "no sufficient basis" to "justify liability under 42 U.S.C. § 1983," was a Massachusetts malpractice case. This petitioner seeks to vindicate a *federal* right; and this is not a malpractice case, of course. The circuit court did not cite an earlier Massachusetts false imprisonment case where the plaintiff prevailed under the very same statutory procedures applicable here without introducing expert medical testimony. *Karjavainen* v. *Buswell*, 289 Mass. 419 (1935). That same case,

and a more recent one affirming it, *Belger* v. *Arnot*, 344 Mass. 679 (1962), also hold that a defendant can justify a plaintiff's commitment to a mental hospital, even if the required procedures were not followed, if he proves that the plaintiff would be dangerous if at large, but the burden, in conformity with the common law rule, is on the *defendant*.

The jury here was correctly instructed to find for the respondents if they proved that the petitioner was in fact committable under the statute. They found on the evidence that she was not. That verdict should be reinstated.

Just because the petitioner here complains of her illegal commitment to a state mental hospital, does not make this a special case. It is, essentially, a federal false imprisonment case under the Civil Rights Act. But if this Court were of opinion that the circuit court's special rule that this petitioner must prove she was not committable should be ratified, the evidence does not permit the ruling that she did not make out a prima facie case. As argued above, the petitioner should at least be provided a new trial and the opportunity to sustain this newly devised burden of proof, but as the jury was not charged that the petitioner must disprove justification, the respondents too are entitled to a jury's determination, if that is held to be the standard. The evidence did not permit the circuit court to rule, however, that there was no evidence the respondents erred, even if one were to pretend that the petitioner knew or should have known that she had to prove that fact. While perhaps slim, the evidence adduced was sufficient for a jury to find that the petitioner was not "in need of immediate care and treatment because of mental derangement other than drunkenness" and would not have been "dangerous if at large":

1. No respondent so opined, either in testimony or in the hospital record;

2. Petitioner had never been committed to a mental hospital or treated by a psychiatrist before or since;

3. The one report of suicidal talk by the petitioner after she fainted must have been, in her opinion, "garbled," and she consistently insisted she very much wanted to live; there were no "repeated threats of suicide" as the circuit court found;

4. After the first day the petitioner was "cooperative," the recurring determinative, and never violent;

5. If the most that could be said was that petitioner was "arrogant," "saucy," had "affected" speech and "artistic pretentions," that does not imply that she was dangerous;

6. The jury and the trial judge had the opportunity to assess each of the respondents, and apparently did not share the circuit court's characterization of them as "a battery of experts";

7. The petitioner's letter to Superintendent Sharp is lucid, reflects normal concern for the everyday facets of her life, and does not hint of any dangerous proclivities;

8. The jury could have attached considerable importance to the fact that the petitioner was released two days after she secured an attorney who talked with Superintendent Sharp; and

9. The petitioner was released after "[o]bservation and examination reveal[ed] . . . [she was] without evidence of psychosis."[12]

The circuit court overlooked this considerable evidence that the petitioner would not have been "dangerous if at large" in July, 1967, any more than she was before or

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[12] The circuit court hypothesized that maybe she warranted commitment on July 6th, however, and her release accomplished because "the five defendants . . . treated plaintiff while confined." The evidence demonstrates, however, that she received no treatment.

since. If it was her burden to prove she was not dangerous, there must be a new trial, however, this evidence supplemented, and, hopefully, not overlooked by a jury.

CONCLUSION

For the following reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion

December 31, 1969

WYZANSKI, *Chief Judge*

This case raises the question whether Section 1 of the so-called Ku Klux Klan Act, the Act of April 20, 1871, c. 22 Sec. 1, 17 Stat. 13, 42 U.S.S. Sec. 1983 gives a federal cause of action to a patient against doctors who, under color of state law, confined her when, under the view of the evidence most favorable to her, it appears that the doctors erroneously, but in good faith, found that she was mentally deranged.

The case was tried to a jury, which returned verdicts for plaintiff against each of the defendants. However, at the close of plaintiff's evidence each of the defendants had moved for a directed verdict. This Court reserved its decision.

On the evidence, viewed most favorably to plaintiff, this was the case that she had shown.

At about 2 P.M. on July 3, 1967, plaintiff, then 46 years of age, went with her dog to a tavern, the Steven (sic) James House, in Cambridge. She had three Manhattans. Then she walked outside. She remembers nothing thereafter until she was on a table in a hospital.

Police brought her to the Cambridge City Hospital. An interne there, Dr. Morgan, executed a so-called pink slip, a form used under Mass. G.L. c. 123, sec. 90. Over his official signature, including his medical degree, he recited that plaintiff was then "in need of immediate care and treatment because of mental derangement other than drunkenness", and that she "has been violent today and stated she wanted to, and is going to, die. . ." 'found by police, crying and muttering about self-destruction. Resisted violently

being brought to hospital, claiming police and hospital personnel were trying to kill her. Is oriented but says she wants to die and will die today. Smells strongly of alcohol."

Armed with the slip, the police took plaintiff to the Westborough State Hospital. After reading the slip and seeing plaintiff mumbling and incoherent, Dr. Grimberg, a physician having a temporary registration to practice, employed by the Commonwealth as a senior psychiatrist at the hospital, being that member of the admissions team authorized to act on July 3, admitted plaintiff at 7 P.M. that day to the hospital. He diagnosed her as having "psychosis due to excessive alcohol in a paranoid person." (Tr. 2-58).

Two days later, July 5, Dr. Segal, a staff physician and senior psychiatrist, saw plaintiff for the first time. He saw her almost daily thereafter. He made specific notes of his July 5, 7, and 12 impressions. The first one recites that "This 46 year old woman is hostile and belligerent and says she wants to die. She shows an affected type of speech, and admits to long alcoholism. She denies violence and had felt that gangsters were taking her away." He knew she had broken a window on July 3. Dr. Segal believed she was pathologically drunk. By July 14 he noted, and informed the hospital superintendent, that she was ready to be brought up for discharge.

Dr. Simon, the director of psychiatry at the Westborough State Hospital, was in charge of the staff conference at which plaintiff appeared on July 5. In a two paragraph note this doctor referred to plaintiff's "pathological intoxication in a sociopathic personality" . . . her absence of any insight in this situation, and the nature of the disturbance she had, with threats of suicide make it imperative that she have a significant period of observation."

On July 7, acting under the authority of Mass. G.L. c. 123, sec. 77, Drs. Aussenheimer and Paine, having actually seen plaintiff, and referring to facts communicated to them in-

cluding the contents of Dr. Morgan's pink slip, certified to the Justice of the First District Court of East Worcester, City of Worcester, that it appeared to each of them that plaintiff was in such mental condition that her commitment to Westborough State Hospital was necessary for her proper care or observation pending the determination of her mental condition. On the basis of that certificate, the justice of that court committed plaintiff to the Westborough State Hospital for 40 days, pursuant to Mass. G.L. c. 123, sec. 77.

Dr. Sharp, the superintendent of the hospital, first reviewed the case when a state legislator called him on July 6 or 7. The superintendent had the power to discharge her at any time, but he did not do so until July 19 when he knew that on July 14 Dr. Segal had indicated that she should be discharged.

While the foregoing recital is necessarily abbreviated, a diligent search of the record reveals no evidence that any defendant acted in bad faith (as, for example, spitefully or corruptly, or with invidious discrimination, or arbitrarily, as, for example, by making a medical determination without either direct observation, or reference to a report.)

42 U.S.C. sec. 1983 gives a remedy only if a state official "under color of any statute. . .causes to be subjected. . .any . . .person. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution."

A person has no Constitutional right to have a state doctor correctly decide his state of mind before confining him in a mental institution. The patient's Constitutional right is to secure due process, equal protection, and like procedural regularities; the patient has no Constitutional right to a correct substantive decision.

Here each doctor acted pursuant to a statutory system (which is not alleged to be itself unconstitutional), and in no instance was there evidence that there was a procedural

departure from the statute. Indeed even if there had been a procedural departure there is no indication that it would have been "purposeful" and so actionable under sec. 1983. See *Rose Chalet Functions Corporation* v. *Evans* (D. Mass.—264 F.Supp. 790.)

There would be tremendous consequences from a decision that permitted persons whose liberty was restrained by procedurally correct, but substantively erroneous, decisions to maintain successful actions under sec. 1983. It would draw to the federal court for review not only every confinement in state mental institutions, but every confinement in state penal institutions. Each state criminal trial would be re-triable in federal court. Surely no support for that proposition has ever been advanced in Congress or in any judicial opinion or other judicial writing of respectability. See *Monroe* v. *Pape*, 365 U.S. 167; Note: Limiting the Section 1983 Action in the Wake of *Monroe* v. *Pape*, 82 Harv. L. Rev. Nor could such a proposition fail severely to undermine the Constitutional balance between the nation and the states.

Moreover, even if sec. 1983 gave to a person a right of action against a state official who made a substantively erroneous determination which caused plaintiff's confinement, these defendants could not be held accountable for various reasons:

1. Dr. Segal, the senior psychiatrist, Dr. Simon, the Director of Psychiatry, and Dr. Sharp, the superintendent did not cause plaintiff's confinement. At most they failed to take steps to secure her release.

2. If there were a cause of action under sec. 1983; the federal courts would have to develop a general set of tort principles appropriate for such causes. See *Monroe* v. *Pape*, *supra; Sullivan* v. *Choquette*, 1st Cir., Dec. 30, 1969. No doubt such general principles derived from case law, juridical writing, restatements and the like, would give an ab-

solute immunity to Drs. Aussenheimer and Paine as court witnesses, and would give a qualified immunity to all the other defendants because they acted in good faith. *Mezullo* v. *Maletz*, 331 Mass. 233, 236-237. See *Pierson* v. *Ray*, 386 U.S. 547.

It is unnecessary to consider whether the absence of expert medical opinion (see *Riggs* v. *Christie*, 342 Mass. 402, 405-407) would also have warranted directed verdicts.

Judgment for defendants upon their several motions for directed verdicts.

(s) Charles E. Wyzanski, Jr.
Chief Judge

31 December 1969

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United States Court of Appeals
For the First Circuit

Nos. 7516, 7517.

SUSAN BEAUMONT,

PLAINTIFF, APPELLANT,

v.

ALEXANDER C. MORGAN,

DEFENDANT, APPELLEE.

SUSAN BEAUMONT,

PLAINTIFF, APPELLANT,

v.

CHRISTIAN W. AUSSENHEIMER, et al.,

DEFENDANTS, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
COFFIN, *Circuit Judge*, and FORD, *District Judge*.

Daniel Klubock, with whom *Daniel F. Featherstone, Jr.* was on brief, for appellant.

Lionel H. Perlo and *Donald J. Wood*, Assistant Attorney General, with whom *Daniel A. Lynch*, *Robert H. Quinn*, Attorney General, and *Ficksman & Conley* were on briefs, for appellee.

June 8, 1970.

COFFIN, *Circuit Judge*. Plaintiff Susan Beaumont brought suit under 42 U.S.C. § 1983 seeking recovery for loss of liberty against six doctors, all of whom played a role in her two-week confinement in a Massachusetts mental hospital. The jury exonerated defendant Morgan, the doctor

who had originally recommended hospitalization, but returned verdicts against the five doctors who had dealt with plaintiff while confined. The district court, however, set these five verdicts aside and entered judgments, notwithstanding the verdicts, for defendants. This appeal followed.

Testimony at trial indicated that plaintiff, a 46-year-old unmarried woman, entered a Cambridge tavern on July 3, 1967, drank three Manhattans, then fainted on the sidewalk outside. Plaintiff claimed to have no memory of the ensuing events until she woke up strapped to an examining table at Cambridge City Hospital. Policemen summoned to her aid, however, testified that she was abusive, struck them repeatedly with her purse and cane, and threatened suicide. The policemen reported this behavior to the interne on duty at City Hospital, defendant Morgan. On the basis of their reports, his own observations of plaintiff's violent behavior, and plaintiff's renewed threats of self-destruction, Morgan concluded that plaintiff suffered from "acute psychosis with alcoholism" and needed further observation. After confirming his diagnosis with a senior doctor, Morgan executed a request for plaintiff's temporary admission to Westborough State Hospital under Mass. Gen. Laws c. 123, § 79, a provision authorizing emergency hospitalization for ten days.

On her arrival at Westborough State, plaintiff was examined by defendant Grimberg, who observed that she was under the influence of alcohol and very belligerent, and tentatively concluded that "her psychosis is probably due to excess alcohol in a paranoid personality". No doctor examined plaintiff on the following day, July 4, but on July 5 plaintiff was examined by defendant Segal, a staff psychiatrist, and by a meeting of the staff chaired by the hospital's director of psychiatry, defendant Simon. The consensus was that plaintiff suffered from

"pathological intoxication in a sociopathic personality", and that circumstances warranted a "significant period of observation" beyond the ten days confinement authorized by § 79.

Further confinement required a certificate of mental illness and a court order pursuant to Mass. Gen. Laws c. 123 § 77. Accordingly, on the following day, July 6, the hospital summoned defendants Paine and Aussenheimer who examined plaintiff and certified to the Westborough District Court that continued confinement was necessary for plaintiff's treatment. The local court, without holding a hearing, issued an order authorizing plaintiff's commitment for forty days' observation. On July 14, defendant Simon noted that plaintiff was ready for discharge. Plaintiff was discharged after staff review of her case on July 19.

The court below, viewing this evidence most favorably to the plaintiff, concluded that defendants had erred in their diagnosis of mental derangement, but had acted in good faith and in conformity with statutory procedures. Were § 1983 actions to succeed under such circumstances, the court reasoned, the federal courts would be inundated with challenges to state confinements, both psychiatric and penal. The court added that, even if a § 1983 claim existed, some of the defendants would escape liability because they did not cause plaintiff's confinement, while others would enjoy absolute immunity as witnesses in a judicial proceeding.

Attacking these rulings and the jury verdict for defendant Morgan, plaintiff raises no fewer than fifteen separate questions. We find it necessary to answer three: whether the court erred in ruling that defendant Morgan was qualified under Mass. Gen. Laws c. 123 § 79 to request temporary care in a state institution; whether defendants properly preserved their rights to request judgments

notwithstanding the verdict under Rule 50, Fed. R. Civ. P.; and whether the evidence, viewed most favorably to plaintiff was sufficient to support the jury verdicts.

We begin with plaintiff's attack on defendant Morgan's authority to request temporary care. Section 79 requires that the physician who makes the request be a graduate of a legally chartered medical school and be registered in accordance with Mass. Gen. Laws c. 112. Defendant had registered in accordance with chapter 112, but only under c. 112 § 9, which grants a limited authority to practice within a specific hospital, rather than under the general registration provision, c. 112 § 2, which permits practice anywhere in the Commonwealth. Plaintiff maintains that § 79's reference to chapter 112 means c. 112 § 2 but not c. 112 § 9.

Plaintiff's interpretation ignores the plain language of the statute. Had the legislature meant to permit only physicians qualified under § 2 to request care, it could undoubtedly have said so rather than leaving this significant limitation to judicial inference. Moreover, plaintiff's interpretation would render superfluous § 79's requirement that the requesting physician be a medical school graduate: all physicians registered under § 2 must be graduates, but a limited registration under § 9 may be obtained after only three and a half years of medical school study. Defendant Morgan, though having only a limited registration, was a medical school graduate. Finally, we note that registration under § 9, while confining the physician to a specific hospital, places no restrictions on his authority to practice medicine within the hospital walls. *Cf. Barette* v. *Hight*, 353 Mass. 268, 273 (1967): We hesitate to create legal restrictions without clear statutory mandate, especially since such restrictions would seri-

ously limit the usefulness of the many internes and residents registered under § 9.[1]

Plaintiff also argues that defendants have lost their right to judgments notwithstanding the verdict by failing to renew their motions for directed verdict at the close of all the evidence as required by Rule 50, Fed. R. Civ. P. The record indicates that all six of the defendants filed motions for directed verdicts at the close of plaintiff's evidence. The court announced that it would reserve its rulings and ordered trial to proceed. Thereafter only defendant Morgan—whose motion for a directed verdict was rendered moot by his favorable verdict—offered evidence. This evidence, consisting of the brief testimony of the three police officers who took plaintiff to Cambridge City Hospital, was relevant to Morgan's case but bore only tangentially on the liability of the remaining defendants. Later that same day, the court informed plaintiff's counsel that he would have an opportunity to rebut defendants' arguments "when I deal with the motions". After the jury retired, the court set a time for the filing of briefs on the motion for directed verdicts. Memoranda were duly filed. While technical non-compliance with Rule 50 always invites trouble, *compare Gillentine v. McKeand*, —— F.2d —— (1st Cir. 1970), circumstances we have related bring this case squarely within our holding in *Bagamon Thom McAn, Inc. v. Miranda*, 409 F.2d 968, 972 (1st Cir. 1969): "[A] case combining . . . judicial assurance concerning preservation of rights at the time of motion and . . . brief and inconsequential evidence following the motion . . . is

[1] Plaintiff relies on Mass. Gen. Laws c. 176B § 1, which defines "registered physician" in terms of c. 112, § 2. Chapter 176B, however, deals with regulation of medical service corporations such as Blue Cross. Moreover, we note that where the legislature wished to use the term "registered physician" in a restrictive sense, it was careful to make its meaning clear.

a proper case for the liberal construction commended by Fed. R. Civ. P. 1 in the interests of justice."

This brings us to the central issue on appeal: whether the evidence was sufficient to support the jury verdicts against the five defendants who treated plaintiff while confined. Under 42 U.S.C. § 1983, plaintiff had the burden of showing both that these defendants acted under color of state law and that they deprived her of federally protected rights, here the right to due process guaranteed by the 14th Amendment. *Stringer* v. *Dilger*, 313 F.2d 536, 540 (10th Cir. 1963); *see Cohen* v. *Norris*, 300 F.2d 24, 30 (9th Cir. 1962).[2] No question is raised on appeal concerning whether defendants acted under color of state law. To carry the second part of her burden, plaintiff argues that defendants denied her due process by ignoring lawful procedures and by performing their statutory duties in a perfunctory manner. Neither theory will bear close inspection.

Plaintiff's allegations concerning abuse of lawful procedure are based in part on a misunderstanding of what Mass. Gen. Laws §§ 77 and 79 require. We have already ruled that defendant Morgan was an appropriate person to make the initial request for hospitalization under § 79. Section 79 imposes an additional duty on the superintendent of the receiving hospital, here defendant Sharp, either to release the patient within ten days or to initiate legal proceedings for a longer commitment. Defendants chose the latter course after examining plaintiff at a meeting of

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[2] The district court submitted our case to the jury on a false imprisonment theory, which placed the burden of showing confinement on plaintiff and the burden of showing justification on defendants. Restatement 2d, Torts §§ 35, 120(c). However, § 1983 does not create a federal cause of action for all confinements, but only those confinements which deny federally protected rights. An essential element of plaintiff's case is proof that defendants deprived her of such rights by abusing lawful procedures. Thus plaintiff, not defendants, has the burden on the issue of justification.

the staff on the first full working day following her admission. Plaintiff argues that the § 79 determination should have been made by defendant Grimberg when she first arrived at Westborough State. This interpretation, however, would defeat the evident purpose of § 79 to insure that the choice between commitment and release is based on careful observation rather than the snap judgment of a single physician.

Plaintiff also complains of various omissions in her hospital records, but these omissions strike us as minor oversights rather than denials of constitutional rights. For example, both the hospital's application for judicial commitment under § 77 and the physician's certificate of mental illness are attacked, as if they were indictments, for lack of the date when plaintiff was taken to the hospital, but the record shows no prejudice from these omissions. Of more moment, perhaps, is the failure to include the names of two persons designated by plaintiff on the application for judicial commitment. Thus the notice required by Mass. Gen. Laws c. 123 § 54 was never sent. It is not, however, clear whether the failure to obtain this information was due to hospital oversight or plaintiff's admitted unwillingness to cooperate. Equally important, plaintiff testified that she was divorced, temporarily unemployed, alone in Boston, without any family and that a long-time friend she had written while in the hospital did not respond. Thus, whether the failure to comply with § 54 was the fault of plaintiff or the hospital, no possible prejudice has been shown.

Plaintiff finds additional evidence of abuse of legal procedures in the failure of the Westborough District Court to hold a hearing on her commitment as allegedly required by § 77. Section 77 makes no mention of a hearing on the need for temporary confinement; plaintiff casually suggests that we should read this requirement into the statute

to avoid constitutional infirmity. Whatever the merits of plaintiff's argument, *but cf. Rohrer, petitioner*, 353 Mass. 282, 286 (1967) the fault for failure to convene a hearing would rest with the local court, not with defendants. Plaintiff also protests the lag between July 14, when defendant Segal informed the superintendent that plaintiff "was to be brought up for discharge", and July 19, when, after staff review of plaintiff's case she was released. However we resist the invitation to elevate the bureaucratic delays inherent in any sizeable institution into violations of constitutional rights. Thus we find no evidence from which a jury might have concluded that defendants abused legal procedures in confining plaintiff.

Apart from these allegations of procedural irregularities, plaintiff has charged that the several defendants made perfunctory and erroneous determinations of her need for confinement. To substantiate this point, plaintiff has testified at length concerning the apparent callousness of defendants and the cursory nature of their examinations. We understand how one who is suddenly deprived of his liberty and subjected to the multiple indignities of a large mental hospital might feel wronged by the doctors responsible. But an essential element of plaintiff's case is proof that defendants erred in thinking that plaintiff's mental condition warranted confinement in accordance with Mass. Gen. Laws §§ 77 and 79. After examining the record, we have concluded—contrary to the district court—that the evidence was insufficient to permit a jury finding that defendants were mistaken.

The record does reveal that a battery of experts thought plaintiff needed immediate hospitalization in early July. The jury has found on adequate evidence that Dr. Morgan's initial request for treatment under § 79 was justified by plaintiff's "mental derangement" requiring "immedi-

ate care and treatment" on July 3.[3] Defendant Grimberg concurred in this initial judgment. Subsequently, on July 5 and 6, the remaining defendants examined plaintiff. They concluded, on the basis of plaintiff's black-out on the evening of July 3, her repeated threats of suicide and their own examinations that she was "in such mental condition that [her] temporary commitment to a mental institution [was] necessary for [her] proper care and observation" as required by § 77.

To rebut this unanimous medical opinion, plaintiff offers only the fact that she was discharged as free of psychosis on July 19 and her own opinion that her behavior was attributable to physical causes rather than mental illness. But the fact that plaintiff was without psychosis on July 19 is not inconsistent with defendants' conclusion that her mental condition warranted confinement on July 6. As for plaintiff's own testimony that her behavior was attributable to physical rather than mental causes, we note the total lack of expert corroboration. While this is not a malpractice case, we think the principle enunciated in *Riggs* v. *Christie*, 342 Mass. 402, 407 (1961) is apposite:

> "In the usual case where matters of professional judgment are involved, a tribunal of fact, whether court or jury, unassisted by expert testimony or evidence from the profession concerned, should not retrospectively substitute its judgment for that of the person whose judgment has been sought and given."

Were we to hold otherwise, any person could make out a prima facie case of illegal commitment by setting up his own opinion of his mental health against the professional

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[3] The district court instructed the jury that, "[T]he real heart of the matter is . . . are you satisfied that Miss Beaumont could be found to have been in need of immediate care and treatment because of mental derangement other than drunkenness?" Thus the jury verdict for defendant Morgan is tantamount to a finding that plaintiff's mental condition on July 3 satisfied § 79.

judgments of, as here, a half dozen physicians.

Plaintiff further argues that "the jury could have found ... that defendants failed to make reasonable independent determinations, and thereby did not meet the requirements of the statutes which they relied on for justification." For the jury so to find would require it not only to disbelieve the testimony of the defendants, but, as we have elswhere said, to "use such disbelief alone to support a finding that the opposite was the fact." *Janigan v. Taylor*, 344 F.2d 781, 784 (1st Cir. 1965), *cert. denied*, 382 U.S. 879. This may not be done either by the court or by a jury. *Federal Insurance Co. v. Summers*, 403 F.2d 971, 974, (1st Cir. 1968).

Thus we can find no sufficient basis for concluding either that defendants abused legal procedures or that they erred in their diagnosis. A fortiori, there is no evidence of the kind of tortious disregard of plaintiff's rights which might justify liability under 42 U.S.C. § 1983.

Affirmed.

APPENDIX B

42 U.S.C. § 1983 Civil Action For Deprivation Of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Mass. G. L.

c. 123 § 51. Certification of mental illness; order of commitment; application; notice; hearing

No person shall be committed to any institution for the mentally ill designated under or described in section ten, except the Walter E. Fernald state school, the Belchertown state school, the Paul A. Dever state school and the Wrentham state school, unless there has been filed with the court a certificate or certificates in accordance with section fifty-three certifying to the mental illness of such person by two properly qualified physicians, nor without an order therefor, signed by a judge designated in section fifty, stating that he finds that the person committed is mentally ill and is a proper subject for treatment in a hospital for the mentally ill, and either that said person has been an inhabitant of the commonwealth for the six months immediately preceding such finding, or that provision satisfactory to the department has been made for his maintenance, or that by reason of mental illness he would be dangerous if at large. The order of commitment shall also authorize the custody of the mentally ill person either at the institution first named, or at any other institution under the control of the department to which he may be properly transferred.

Upon receipt of an application for commitment the court shall cause written notice to be personally served upon the person named therein informing the said person of the application for commitment and of his right to a hearing at which he can be present and be represented by counsel. A copy of such notice shall be mailed to the nearest relative or guardian of the person served at the last known address of the relative or guardian if such address can be found after diligent search, and such copy shall become a part of the commitment record and be sent with the patient's record in accordance with the provisions of section fifty-four to the institution to which he is committed. The person served shall be allowed forty-eight hours in which to request a hearing, and further time, not less than seventy-two hours, is desired for the preparation of his case. The court may at its discretion hold a private hearing at a place convenient for the person served. If the person does not request a hearing, the court may order commitment on the application, medical certification, and any other evidence it may require. In all cases it shall certify in what place the mentally ill person resided at the time of his commitment; or, if the commitment is ordered by a court under section one hundred or one hundred and one, the court shall certify in what place the mentally ill person resided or was at the time of the arrest upon the charge for which he was held to answer before such court. Such certificate shall, for the purposes of section fifty, be conclusive evidence of the residence of the person committed. In any commitment under sections ninety-nine through one hundred and five, inclusive, where the person is before the court in connection with a criminal matter, the court may commit the person to a mental institution in accordance with the provisions of said sections and this section, but no additional hearings as established by this section need be held in addition to the hearings provided in sections ninety-nine through one hundred and five.

Mass. G. L.

c. 123 § 77. Temporary commitment for observation; discharge; application for prolonged judicial commitment; notice

If a person is found by two physicians qualified as provided in section fifty-three to be in such mental condition that his temporary commitment to a mental institution is necessary for his proper care and observation, he may be committed by any judge mentioned in section fifty for forty days' observation and treatment in a state mental hospital, the McLean Hospital, or, in case such person is eligible for admission thereto, in a United States government institution, the person having charge of which is licensed under section thirty-four A. Within forty days after such person has been received at the hospital the superintendent or manager shall discharge the person if he is no longer in need of treatment, and shall notify the judge who committed him of such action. If, however, the superintendent or manager determines within said forty-day period that the person is in need of further treatment, he may forthwith cause application to be made for prolonged judicial commitment under section fifty-one, or he may allow the patient to remain in the hospital as a voluntary patient. Notice to the patient and his relative of the application for prolonged judicial commitment shall thereupon be given in accordance with section fifty-one. During the pendency of such application for prolonged commitment, the person may be detained at the institution.

Mass. G. L.

c. 123 § 79. Temporary care for mentally deranged persons needing immediate care and treatment; request; examination; expenses

The superintendent or manager of any institution for the insane may, when requested by a physician, sheriff, deputy sheriff, member of the state police, police officer of a town,

or by an agent of the institutions department of Boston, receive and care for in such institution as a patient, for a period not exceeding ten days, any person deemed by such superintendent or manager to be in need of immediate care and treatment because of mental derangement other than drunkenness. The physician shall be a graduate of a legally chartered medical school, shall be registered in accordance with chapter one hundred and twelve, or shall be a commissioned medical officer of the United States army, navy or public health service acting in the performance of his official duties, and personally shall have examined the patient within twenty-four hours of signing the request. Such request for admission of a patient shall be put in writing and be filed at the institution at the time of his reception, together with a statement in a form prescribed or approved by the department, giving such information as it deems appropriate. Any such patient deemed by the superintendent or manager not suitable for such care shall, upon the request of the superintendent or manager, be removed forthwith from the institution by the person requesting his reception, and, if he is not so removed, such person shall be liable to the commonwealth or to the person maintaining the private institution, as the case may be, for all reasonable expenses incurred under this section on account of the patient, which may be recovered in contract by the state treasurer or by such person, as the case may be. The superintendent or manager shall either cause every such patient to be examined by two physicians, qualified as provided in section fifty-three, and cause application to be made for his admission or commitment to such institution, or cause him to be removed therefrom before the expiration of said period of ten days, unless he signs a request to remain therein under section eighty-six. If application is made by the superintendent or manager for prolonged judicial commitment under section fifty-one, the patient

may be detained over the ten-day period pending determination of the application. The officers mentioned in section ninety-five or any member of the state police may transport the patient, or cause him to be transported, to the institution. Reasonable expenses incurred for the examination of the patient and his transportation to the institution shall be allowed, certified and paid as provided by section seventy-four. In instances where an individual, deemed by the department to be entitled to care in this commonwealth, is being held in a mental hospital or other place of detention for mental patients in another state awaiting transfer to a state hospital in this commonwealth, and such transfer has been approved by the department, the commissioner or any other medical officer of the department may sign such a request, without personal examination of the patient, to authorize his immediate hospitalization upon arrival in this commonwealth.

Rule 50.
Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied of for any reason is not

granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgement in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court his otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

APPENDIX C

File in Patient's Record — Susan Beaumont

July 11, 1967

Dear Dr. Sharp,

On Monday last I left my apartment to take my dog for an afternoon walk and stopped for a cocktail in a lounge near my home. I stayed to have three drinks and left. I remember walking down the restaurant steps feeling the heat and the sun — and that is the last I remember until I regained consciousness lying face up on a table with my hands and feet tied. I evidently fainted in the street.

Still tied, I was brought here. I was held incommunicado for two days in your violent ward before I was permitted to make a phone call to let a friend know where I was. I am not now permitted to make any calls at all.

I have not been told why I was brought here by force and am being held against my will; apparently I was thought to be drunk. However, even if I had been, it does not justify my being deprived of my rights and my freedom and locked in a mental hospital.

A bone in my foot, broken in January, which had only recently begun to heal, I think has been rebroken. My left hand is partially numb from maltreatment received when I was brought in. I was quite hysterical with fear because I didn't know who was bringing me nor where I was being taken. It was three days before I could get a bandaid on a cut finger, and a laceration on my ankle became infected before anyone here would treat it.

These are small matters compared to the loss of my freedom.

I have no family in Boston and few friends because I've been here a comparatively short period of time. I'm dependent upon my own efforts to maintain myself. If I am detained for too long, I will lose everything I possess. My

dog, which I had with me that day, has been impounded in a kennel; that was ten days ago and I do not know how long they will keep him before he is disposed of. I cannot expect my landlord to keep my things too long, and everything I own is in my apartment. I am not even permitted to telephone him to explain my absence.

I saw a Dr. Siegal very briefly two days after I was brought here, who told me he didn't understand why I was here and that he thought it strange. However, I found Dr. Simons at the staff meeting later to be extremely unsympathetic and was told by him that I must either sign a voluntary commitment paper or be committed here for 35 days by a court. I agreed to sign the voluntary paper, but have been asked to sign nothing.

I still do not know by what right I was brought here nor why I should continue to be held against my will. I've not been questioned by a psychiatrist nor have I spoken to anyone except nurses since last Thursday on my very brief second meeting with Dr. Siegel, at which time he told me rather vaguely that the staff wanted to find out "what makes me tick." I have not even seen a social worker, though I requested one last week.

I have written to my physician, Dr. Louis Kassler at 921 Beacon Street, Boston, whom I have been seeing for my injured foot since February and, since he knows me as a patient, I am sure he would be more than pleased to confer with you or with anyone on your staff.

I'm sure you do not want anyone to suffer unnecessarily nor to have their life destroyed.

I cannot stress the urgency with which I ask you to investigate this matter. I earnestly request that I be permitted to return to my home, my work and my life.

Yours very truly,

Susan Beaumont

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 513

SUSAN BEAUMONT,
PETITIONER,

v.

CHRISTIAN W. AUSSENHEIMER, ET AL,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
Opinions below	1
Question presented	1
Statutes involved	2
Statement	2
Argument	2
Conclusion	5

TABLE OF AUTHORITIES CITED

Cases

Breen v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969)	5
Coca Cola Bottling Co. of Black Hills v. *Hubbard*, 203 F.2d 859 (8th Cir. 1953)	3
El Rancho, Inc. v. *The First National Bank of Nevada*, 406 F.2d 1205 (9th Cir. 1968), cert. denied, 396 U.S. 875 (1969)	3
Green v. *The American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), cert. denied, sub nom. *The American Tobacco Co.* v. *Green*, 377 U.S. 943 (1964)	3
Monroe v. *Pape*, 365 U.S. 167 (1961)	4

Statutes and Rules

Federal Rules of Civil Procedure, Rule 50	4
Massachusetts G.L. (Ter. Ed.) c. 123 §51	2
42 U.S.C. §1983	1, 4

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Opinions Below

The opinion of the Court of Appeals (Pet. 25-34) is reported at 427 F.2d 667. The opinion of the District Court has not been reported but is set out in the petition, pp. 20-24.

Question Presented

Susan Beaumont brought a civil rights action under 42 U.S.C. §1983. The question presented by the petition is

whether she adduced sufficient evidence to warrant the jury verdicts that her hospitalization was in violation of her right to due process guaranteed by the Fourteenth Amendment.

Statutes Involved

The pertinent statutes involved are set out in the petition, pp. 35-41.

Statement

Respondents do not dispute petitioners Statement of the Case in so far as it embraces what the jury could have found from evidence most favorable to petitioner. However, petitioners assertion (Pet. 7) that for a court to order a §77 commitment there must be a certificate from two doctors that the person committed would be dangerous if at large, is not correct. Massachusetts General Laws c. 123 §51 provides that the committing judge may make such finding.

Argument

The petition presents no substantial question warranting further review by this Court. The decision of the lower court is correct.

Petitioner urges this Court to grant certiorari on the ground that the decision below conflicts in three respects with decisions in other circuits.

I.

It is argued that the court below held that the legal theory on which the case was submitted to the jury without objec-

tion, does not become the law of the case and that this holding agrees with the Eight Circuit and conflicts with the Fifth and Ninth Circuits.

An examination of the cases cited by petitioner reveals that there is no conflict on this issue.

The law is that if no objection to instructions is made in the trial court a party may not question them on appeal. *El Rancho, Inc.* v. *The First National Bank of Nevada*, 406 F.2d 1205, 1215 (9th Cir. 1968), *cert. denied*, 396 U.S. 875 (1969); *Green* v. *The American Tobacco Co.*, 325 F.2d 673, 676, (5th Cir. 1963), *cert. denied, sub nom. The American Tobacco Company* v. *Green*, 377 U.S. 943 (1964); *Coca Cola Bottling Co. of Black Hills* v. *Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953). Respondents did not question the trial court's instruction on appeal. The Eighth Circuit in *Coca Cola* held that for the purpose of reviewing a ruling on a motion for directed verdict it will apply the law it thinks correct and that it is not confined to an incorrect statement of law contained in instructions.

In *Green* and *El Rancho* supra, the instructions correctly stated the law and in *El Rancho*, the appellant sought to question the instruction for the first time on appeal. Neither Circuit was faced with having to review action on a motion for directed verdict when the instructions incorrectly stated the law as was the First Circuit. Further the Ninth Circuit in *El Rancho* rejected appellant's attempt to question on appeal instructions to which no objection was made and thereby followed *Coca Cola* of the Eighth Circuit. Thus, there is no conflict on this issue as petitioner asserts.

II.

It is further asserted by the petitioner that the Court of Appeals is in conflict with other circuits because its decision impliedly held that respondent's motions for directed

verdicts complied with Rule 50.(a). As petitioner points out this point was briefed and argued below. Therefore, it is implicit also that the court below found from the portions of the transcript cited to it that the trial judge knew the basis of the motions and that there had been substantial compliance with Rule 50. The transcript clearly shows that the decision was correct and applied the law of this Court.

III.

It is fundamental that for petitioner to recover under §1983 a right secured by the Constitution must have been violated. Since she has not challenged the constitutionality of the statutes under which she was hospitalized, the only possible violation would be sufficient non-compliance with them to constitute a violation of the due process clause.

Hospitalization alone is not a violation of a federally protected right. And therefore hospitalization under the justification of state statutes (which were not challenged) clearly is not such violation. Viewing the petitioner's §1983 action up to this point, a motion for directed verdict would be properly granted. What more must she do to overcome such a motion? She must produce evidence that by failure to comply with the pertinent statutes she was not accorded due process. This is what the Court below held when it said that she has the "burden on the issue of justification". If this were not the law, as both the District Court and Court of Appeals stressed, any person could make out a prima facie §1983 action by merely relying on his own testimony of his mental health, leaving the burden of rebuttal and statutory compliance with the defendants.

It is submitted that this Court did not intend such far reaching results when it said in *Monroe* v. *Pape*, U.S. 167, (1961) that §1983 "should be read against the background of tort liability".

The cases petitioner cites in support of her "conflict" on this issue do not withstand scrutiny. *Whirl*, *Joseph*, *Bauers*, *Lynch* and *Calum* all involved plaintiffs who were jailed and who produced evidence of violation of a federally protected right.

Breen v. *Kahl*, 419 F.2d 1034, is not helpful for it involved a state's justification for a regulation the constitutionality of which was challenged.

The remaining cases urged upon the Court as indicative of grave conflict also fail the petitioner. It is submitted that petitioner's threefold claim of conflict among circuits is without merit.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October, 1970.